IN THE

Supreme Court of the United States

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October Term, 1972

No. 72-286

AMERICAN AIRLINES, INC.,

Petitioner,

vs.

JOHN P. LOCAYNIA, STEVEN D. GOLDEN, and RAYMOND C. SPECHT, JR.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, American Airlines, Inc. (American), defendant below, respectfully prays that a writ of certiorari issue to review the judgment upon a divided opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding. That decision below reversed the judgment of the United States District Court in favor of American dismissing the claims there asserted.

Opinion Below.

The opinion of the Court of Appeals is reported in 457 F. 2d 1253 and is contained in Appendix A hereto. There was no opinion by the District Court below.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 17, 1972 and amended April 13, 1972. A

timely petition for rehearing was denied May 25, 1972, and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented.

Whether under §9 of the Universal Military Training and Service Act, which protects the job "seniority" rights of returning veterans, the rights of returning veterans to vacation pay automatically accrue on the basis of seniority alone or must vacation pay be earned where under the collective bargaining agreement the right is also subject to the satisfaction of bona fide work conditions?

Statutory Provisions Involved.

Section 9 of the Universal Military Training and Service Act, as amended, 50 U.S.C. App. §459 (the Act), provides in relevant part:

"SECTION 9. SEPARATION FROM SERVICE

* * * * *

(b) *Reemployment rights*

In the case of any such person [inducted into the armed forces] who, in order to perform such training and service, has left or leaves a position . . . in the employ of any employer and . . . makes application for reemployment within ninety days after he is relieved from such training and service . . .

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer

. . . to such position or to a position of like seniority, status, and pay;

* * * * *

(c) *Service considered as furlough or leave of absence*

(1) Any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces . . .

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Statement of the Case.

The plaintiffs, Locaynia, Golden and Specht, respondents herein, were employed by American in 1964 and 1965. They entered military service in 1965 and

were reinstated to their former positions by American at various times from June to October, 1967.[1]

The applicable collective bargaining agreement between American and plaintiffs' union, the Transport Workers of America, AFL-CIO, prescribed the terms and conditions affecting their employment including work obligations, compensation, provisions for leave of absence and vacation pay. Those provisions are contained in Appendix B, pp. 21 to 24.

Pursuant to the agreement the employee is required to work 40 hours each week (Article 3). He may not be absent from duty without written permission except for sickness, injury or cause beyond his control (Article 24). He may be granted leave of absence without loss of seniority for stipulated periods when the work requirements will permit (Article 17). The employee's eligibility for vacation pay, and the length and amount thereof, are governed by the various subparts of Article 8 which set vacation pay on a combination of the employee's tenure and the work he has performed during the preceding year: Thus, an employee with 1-5 years of continuous service has a vacation allowance of two weeks (10 regular work days); one with 5-15 years tenure has 3 weeks (15 regular work days), etc. By subpart (e) of Article 8, an employee's ordinary vacation entitlement when he actually works the full preceding vacation-earning year, is reduced (or eliminated) for absences exceeding 60 days, the amount of

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[1]The specific dates are as follows:

Name	Hired	Left for Military	Rehired
Locaynia	Nov. 4, 1964	May 22, 1965	June 5, 1967
Golden	March 29, 1965	Oct. 22, 1965	Oct. 16, 1967
Specht	April 27, 1964	May 22, 1965	June 12, 1967

reduction being one-tenth of the ordinary vacation entitlement for each additional 30 days of absence. The result is, for example, that if an employee with no more tenure than the plaintiffs had (less than 5 years) works but 4 months, he is entitled to only 4 days paid vacation the following year; if he does not work at all, he gets no vacation.

The provisions of the agreement dealing with military leave are:

"ARTICLE 18—MILITARY LEAVE

(a) The reemployment and seniority status of any employee hereunder, who, while in the active service of the Company entered the armed services or the Merchant Marine of the United States, shall be governed by the provisions of the Selective Training and Service Act of 1948, as amended, or other applicable law.

(b) Time spent on military leave shall count as time worked for purposes of seniority, wage rates within the employee's classification and vacation.

* * * * *"

When the plaintiffs left for military service in 1965, American paid them their total vacation accrued to their date of departure. And, while in military service, the plaintiffs earned 2½ days vacation from that service for each month in the military, 10 U.S.C. §701, 37 U.S.C. §501.

When the plaintiffs were restored to their former positions in 1967, American gave them full seniority credit for their period of military service. Thus, for example, Locaynia qualified for 15 rather than 10 work days of vacation entitlement after 1969 because

American had given him two years seniority credit for his term of military service. But the plaintiffs received no paid vacation from American the year they returned (1967) because they had not performed any work during the preceding vacation-earning year, being on leave status as prescribed by the first clause of §9(c) of the Act. Moreover, for the same reason, in 1968 they only received partial paid vacations (Locaynia and Specht, 7 days; Golden, 3 days) measured by the work they performed the preceding year. Because they did not receive full paid vacations in both 1967 and 1968 they sued American in the District Court, invoking jurisdiction under 50 U.S.C. App. §459(d). Essentially plaintiffs contend that *all* aspects of their vacation entitlement are controlled by seniority considerations alone.

Upon opposed motions for summary judgment supported by affidavit, stipulated facts and depositions, the District Court granted summary judgment in favor of American. It found, among other things, that American had given the plaintiffs seniority credit for their military service, that the vacation allowances were a form of deferred compensation for services actually performed, and that American had not denied any perquisites, rights or advantages of seniority, status or pay.

The Ninth Circuit by a split decision (Appendix A) reversed. The majority opinion did not hold that any of the District Court's findings of fact were erroneous.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Interpretation of §9 of the Universal Military Training and Service Act.

The pivotal question is whether the rights of returning veterans to vacation pay are *solely* governed by their seniority. If so, the mandate of the second clause of §9(c) of the Act, that they be "restored [to their former position] without loss of seniority", would automatically entitle them to vacation pay based on tenure factors alone, even if no work is performed where the collective bargaining agreement prescribes that bona fide work requirements must be satisfied as a measure or condition of entitlement to vacation pay.

On the other hand, if the Act does *not* override bona fide requirements of the collective bargaining agreement that require vacations to be earned the same as wages, then such work requirements are not vitiated and neither vacation nor wages are earned until the work set out is performed.

Before this Court's decisions in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966) and *Eagar v. Magma Copper Co.*, 389 U.S. 323 (1967), there was no substantial conflict in the lower federal courts on this question. A returning veteran's vacation rights were generally regarded as protected by the "other benefits" provision, the third clause of §9(c)[2] and so were not thought to be governed, in *all* respects, by

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[2]This clause prescribes that a veteran ". . . shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough and leave of absence in effect with the employer at the time such person was inducted into such forces . . ."

seniority considerations but to be subject to "established rules and practices relating to employees on furlough or leave of absence." Thus, it was the consensus of the circuits to which the issue had been presented that the vacation entitlement of a returning veteran depended on satisfaction of any bona fide work requirements that existed which conditioned that right.[3]

Confusion, however, followed this Court's *Accardi*[4] and *Eagar*[5] decisions, to such extent that a conflict has now developed in the circuits on the question presented. The Fifth Circuit, *Dugger v. Missouri Pacific R.R.*, 403 F. 2d 719 (5th Cir. 1968), *cert. denied*, 395 U.S. 907 (1969), and the Tenth Circuit, *Kasmeier v. Chicago, Rock Island And Pacific R.R.*, 437 F. 2d 151 (10th Cir. 1971), ruled that *Accardi* and *Eagar* do not require that *all* aspects of a veteran's vacation entitlement be regarded as attributes of seniority absolutely guaranteed

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[3]*Foster v. General Motors Corp.*, 191 F. 2d 907 (7th Cir. 1951), *cert. denied*, 343 U.S. 906 (1952); *Siaskiewicz v. General Electric Co.*, 166 F. 2d 463 (2d Cir. 1948), per Frank, Cir. Judge; *Dwyer v. Crosby Co.*, 167 F. 2d 567 (2d Cir. 1948), per L. Hand, Cir. Judge; *Dougherty v. General Motors Corp.*, 176 F. 2d 561 (3d Cir. 1949), *cert. denied*, 338 U.S. 956 (1950); see, *Alvado v. General Motors Corp.*, 229 F. 2d 408 (2d Cir. 1956), per Frank, Cir. Judge, *cert. denied*, 351 U.S. 983 (1956).

[4]*Accardi* did not permit a "compensated service" criterion to exclude military service time in the computation of a severance allowance where the standard was but a "transparent label" leading to possible "bizarre results" inasmuch as under the formula a worker could receive a full year of "compensated service" credit by merely working seven days during the entire year. This Court decided "the real nature of these payments was compensation for the loss of jobs." 383 U.S. at 230.

[5]*Eagar* was a 5-3 *per curiam* reversal (the majority ruling without opinion but citing *Accardi*) of a Ninth Circuit post-*Accardi* split decision against the veteran who *had* satisfied the work requirements entitling him to vacation and holiday pay (he had worked the required 75% of the available shifts to earn the vacation but was not an employee when his vacation began, as the contract required, because he had six days previously entered into military service; and he had worked on the day before and the day after the holidays in question.)

by §9 of the Act. They also held that these decisions of this Court have not vitiated bona fide work requirements where they appear in collective bargaining agreements as a condition to be satisfied before a paid vacation is earned.

But a conflicting and contrary construction has been given *Accardi* and *Eagar* by the majority opinion of the Ninth Circuit in these proceedings[6] and, arguably, by the Sixth Circuit, *Edwards v. Clinchfield R.R.*, 408 F. 2d 5 (6th Cir. 1969) and the Eighth Circuit, *Morton v. Gulf, Mobile and Ohio R.R.*, 405 F. 2d 415 (6th Cir. 1969).[7]

Quite naturally, this confusion in the circuits spread to the district courts in post-*Accardi* litigation,[8] with the result that not only returning veterans and their labor representatives but industry as well are uncertain on the important questions as to the continued vitality of bona fide work requirements.

In sum, whereas prior to *Accardi* the lower federal courts were in essential agreement on this issue, now

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[6]The majority opinion below, 457 F. 2d at 1256, n. 7, recognizes its conflict with the Tenth Circuit's *Kasmeier* decision.

[7]The majority below also cited the Fifth Circuit, *Hollman v. Pratt & Whitney Aircraft*, 435 F. 2d 983 (5th Cir. 1970), as supporting its conclusions, 457 F. 2d at 1256, n. 7. But we submit this is questionable for Hollman had satisfied his six-month work and "gross earning" requirement on which his vacation depended; his only shortcoming, like that of the employee in *Eagar*, was that he was not on the payroll at the end of the year, his absence having been necessitated by military service. 435 F. 2d at 985, 988.

[8]Compare *Ewert v. Wrought Washer Mfg. Co.*, 335 F. Supp. 512 (E.D. Wis. 1971), *Messina v. Consolidated Freightways Corp.*, 315 F. Supp. 340 (W.D.N.Y. 1970), and *Kelly v. Chicago, Rock Island And Pacific R.R.*, 293 F. Supp. 423 (W.D. Okla. 1968) with *Connett v. Automatic Electric Co.*, 323 F. Supp. 1373 (N.D. Ill. 1971), *Bradley v. General Motors Corp.*, 283 F. Supp. 481 (E.D. Mo. 1968) and *Tuttle v. U.S. Plywood Corp.*, 293 F. Supp. 401 (D. Ore. 1968).

there is confusion and conflict due in considerable part to the split *per curiam* reversal, without opinion by the majority, in *Eagar* citing *Accardi*. This has led a respected jurist recently to observe ". . . it is difficult to determine the precise scope of the Court's ruling [in *Eagar*]," and to cite the Fifth Circuit decision in *Hollman* and the Tenth Circuit's in *Kasmeier* as reflecting "the current state of uncertainty of the precise status of vacation benefits [of returned veterans] vis-a-vis 'perquisites of senority' [guaranteed by §9]," *Connett v. Automatic Electric Co.*, 323 F. Supp. 1373, 1376, 1378 (N.D. Ill. 1971), per Will, D. Judge.

The conclusion has also encouraged some courts to engage in the unsatisfactory practice of speculating on the meaning of the *per curiam* reversal of *Eagar* by drawing negative implications from the dissenting opinion, as was done by both the majority and dissenting opinions below, 457 F. 2d at 1256, n. 7, and 1260, and by the district court in *Ewert*, 335 F. Supp. at 514.

It is in the interest of justice and the conversation of judicial resources that this important area of law be clarified.

2. The Decision Below Concerns Important and Recurring Problems Which Should Be Settled Concerning the Vacation Pay Rights of Veterans Who Have Returned to Their Civilian Occupations.

The conflict in the wake of *Accardi* and *Eagar*, and the wide-spread and recurring instances presenting the questions now before this Court when veterans resume civilian life, are compelling reasons why this Court should entertain this proceeding to settle the questions. Inherent in the issues in this proceeding are important

questions of statutory interpretation and of policy which are not now resolved. Among the unanswered questions thus posed are:

(a) *What is the scope of a veteran's "seniority" rights, protected by §§9(b) and (c) of the Act, as applied to his entitlement to vacation pay?* Though this Court in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946) ruled against a veteran's claim that his seniority was superior to that of non-veterans with higher shop seniority, nevertheless it laid down the principle that the veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." 328 U.S. at 284-85. And the root meaning of that "seniority" was defined in *Accardi* to be those "rights and benefits which would have *automatically* accrued to them had they remained in private employment rather than responding to the call of their country." 383 U.S. at 229-30; emphasis supplied.

Thus there is presented the question involved in this litigation whether a right that does *not* "automatically" accrue through the mere passage of time is "seniority" within the Congressional intendment, protected to the extent of overriding bona fide provisions of a collective bargaining agreement that are to the contrary. Where as here a veteran's right depends on the performance of work and not the mere passage of time, such as his entitlement to salary or vacation pay, did Congress intend the anomalous result that "seniority"

or tenure would, *by itself*, confer the benefit without any work? By analogy, for example, is a veteran also entitled to vacation pay from his employer *during* the period of his military service—or to wages?[9]

This question is squarely presented by this case, and it goes to the heart of the inquiry as to what was the Congressional intention. Thus the dissenting opinion below, commenting on the work requirement that here limits the vacation entitlement, stated:

> ". . . [I]t is a requirement that the employee earn his vacation. He is being given additional compensation for services actually rendered. If he does not render the required services, his pay is reduced accordingly. To find this requirement to be one of seniority would be to open the door to a finding that the fact of payment for work is within the definition of 'seniority, status, and pay' and that the employee's salary or wage must be continued during the time he is in military service. Clearly, such a result was not intended by Congress." (457 F. 2d at 1260-61; Appendix A, p. 16.)

(b) *Does the Act mandate that all aspects of vacation pay are perquisites of "seniority" protected by*

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[9]District Judge Wills disposed of this issue as follows:
"The gist of the plaintiffs' argument is that any benefit that would have automatically accrued to a veteran had he stayed on his civilian job should be given to him upon his return. If this conception were adopted, any returning veteran would be entitled not only to annual vacation benefits for the years in which he was in the armed forces but also to regular pay by the employer for that period of time, as well as compensation for single paid vacation days, Christmas bonuses, and anything else the employer paid to employees during his absence. Plaintiffs seek to push the rationale of *Accardi* and *Eagar* to illogical extremes." *Connett, supra,* 323 F. Supp. at 1379.

the Act? American does not dispute that important aspects of vacation pay are, under the collective bargaining agreement, perquisites of seniority, just as some aspects of wages are. Thus there is no dispute that an employee's overall period of service with the company escalates the amount of the vacation entitlement that he may earn (Article 8(a)), as well as his wage rate. American has heeded the teaching of *Fishgold* by escalating the veterans' seniority by their military service time; thus, Locaynia's two years in the service qualified him to earn 15 instead of 10 workdays of vacation following 1969. This placed the plaintiffs on a par, seniority-wise with their co-workers who did not enter military service.

But there are, we submit, important aspects of vacation entitlement that have nothing to do with seniority: The entitlement must be earned by the performance of any work that is required bona fide by the collective bargaining agreement.[10] That is the essential thrust of the decisions of the Second Circuit (*Siaskiewicz, Dwyer*), the Third Circuit (*Dougherty*), the Fifth Circuit (*Dugger*), the Seventh Circuit (*Foster*) and the Tenth Circuit (*Kasmeier*), and of the dissenting opinion below.

Applying the *Fishgold* and *Accardi* rationale regarding the nature of the "seniority" protected by Congress, it seems evident that where, as here, the right in question comprises *both* seniority and compensation aspects, the latter has not been swallowed up by the former through any mandate of the Act, but rather

[10]The work requirements here allow and scale vacation entitlement precisely to time worked. See, p. 4, *supra;* Finding 9 of the District Court below; and the dissenting opinion, 457 F. 2d at 1260-61; Appendix B, p. 16.

persists as an independent element of the right to be satisfied before it is given.

(c) *Have Accardi or Eagar obliterated the distinction between protection of a veteran's seniority rights and the continued vitality of bona fide work requirement operating as a condition to vacation pay entitlement?* In *Accardi* this Court characterized the "compensated service" provision (whereby the employer sought to exclude the veteran's time in military service from the computation of severance benefits) as but a "transparent label" and pointed to "the bizarre results possible" under that formula.[11] It rejected the formula as an appropriate basis for determination of the payment owed on the ground that "the real nature of these payments was compensation for loss of jobs" so that those "with the most seniority should receive the highest allowances since they were giving up more rights and benefits than those with less seniority." 383 U.S. at 230.

We thus submit that *Accardi* did not regard, much less hold, that "seniority" provides the sole criteria for entitlement to vacation pay. When the "compensated service" provision of *Accardi* was said to obscure the true nature of the payment, the Court at least implied the contrary could have been the case had the provision been a genuine requisite.

Similarly *Eagar's per curiam* reversal does not reflect a contrary interpretation. It is clear that Eagar *had satisfied* the work requirements entitling him to the vacation and holiday pay claimed. He had, as re-

[11]Under the formula an employee could receive credit for a full year of "compensated service" by only working seven days (one day in each of seven months) while another might have actually worked a full year for like credit.

quired, worked at least 75% of the available shifts during the work year and had worked just before and after the holidays in question. *Magma Copper Company v. Eagar*, 380 F. 2d 318, 320 (9th Cir. 1967). This being the context, it would be impermissible to read this Court's *per curiam* reversal as holding that satisfaction of bona fide work requirements may *not* be a requisite for the recovery of vacation pay.

The reversal means no more than that this Court disagreed with the Ninth Circuit's classification of the elements missing from Eagar's case as non-"seniority" rights (*i.e.*, as to vacation pay, the fact that Eagar was not in the service of the company at the end of his vacation-earning year as required by the contract and as to holiday pay, that he had not been on the company's payroll for the required period prior to the holidays in question). Viewed in this light, the reversal was consistent with *Fishgold* and *Accardi*, for both these missing elements related to *duration* of employment and not to the performance of work. Eagar had done the work required, and by the passage of time without more those rights did accrue.[12] *Eagar* sharply differs from this case on the critical element of satisfaction of work requirements. It is reading too much into *Eagar's* reversal to say that vacation pay in all its aspects had been swept up as a "seniority" right.

(d) *Does the first clause of §9(c), that a veteran "shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces", effectively define the veteran's employment status while in the service?* This

[12]It should be noted that the precise problem in *Eagar* is not in this case for American gave each plaintiff his accrued vacation pay up to the date he entered military service.

clause stands as an independent element of §9(c), separate from the following clauses protecting veterans against "loss of seniority" and entitling them to "other benefits" offered by the employer. American determined the vacation pay rights in this case precisely on the basis that the plaintiffs were on leave status while in service. Is that first clause to be given no meaning or effect? Does the title of §9(c) that "Service [is] considered as furlough or leave of absence" have no significance?

(e) *Does the "other benefits" clause of §9(c) have any bearing on the resolution of the question?*[13] This is the third clause of §9(c), and is the provision generally regarded as applicable by the pre-*Accardi* decisions (p. 8, n. 3; p. 9, n. 8). The majority opinion below assumes American's position to be based on that clause, but that is not the case: Our contention simply is that vacation pay is not, in all its aspects, a "seniority" right; that for plaintiffs to recover they must establish the vacation pay they seek is entirely a "seniority" right protected by the Act or is owed them under the "other benefits" protected by the third clause of §9(c); and that if they fail to make such a showing, there may be no recovery. Thus the defense is not anchored to any proposition that the "other benefits" clause solely controls the disposition of the case.

The proper resolution in this respect is, we submit, the recent conclusion of the Tenth Circuit in *Kasmeier:*

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[13]This clause provides that a veteran restored to a position as required by the Act "shall be entitled to participate in insurance and other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces. . . ." 50 U.S.C. App. §459(c).

> "The Supreme Court does not hold in either *Accardi* or *Eagar* that a right or benefit, which would accrue only by rendering a specified number of compensated work days, must be considered a perquisite of seniority. Indeed, by negative implication, a benefit which does not accrue automatically with tenure is not within the scope of 'seniority' as used in the Act. That is precisely this case." (437 F.2d at 155.)

In *Accardi* this Court did not attempt to determine the exact scope of the "other benefits" clause, finding it enough to say for purposes of that case that it was "intended to add certain protections to the veteran and not to take away" the "seniority" rights granted him by the Act. 383 U.S. at 232. What bearing, if any, the "other benefits" clause has on this subject is a matter of uncertainty among other lower federal courts (*see Kasmeier, supra,* at 156; *Connett, supra,* at 1375, 1378), and we submit, should now be settled by this Court.

Conclusion.

Accardi teaches that a seniority right is one that accrues "automatically" from the mere passage of time, that is, without the employee lifting a finger. That aspect of the rights in question was freely given the plaintiffs when American gave them credit for their period of military service in determining their pay scale and the amount of vacation pay they would get if a vacation is earned. Plainly, since the entitlement to vacation just as salary does not accrue merely from the passage of time but is conditioned upon the satisfaction of bona fide work requirements, they are not part of the seniority protected by the Act. The separate seniority and

work aspects may not be blithely melded by a superficial gloss on the controlling statutory language or the *Accardi* and *Eagar* decisions.

Because of the importance of these questions to returning veterans and employers as well, and in face of the unsettled state of the law, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A.

[Locaynia Opinion].

John P. Locaynia et al., Plaintiffs-Appellants, v. American Airlines, Inc., a corporation, Defendant-Appellee. No. 24861.

United States Court of Appeals, Ninth Circuit.

March 17, 1972.

As Amended April 13, 1972.

Rehearing Denied May 25, 1972.

HUFSTEDLER, Circuit Judge:

Locaynia, Golden, and Specht filed an action against their employer, American Airlines ("American") to recover vacation pay claimed due them under the terms of a collective bargaining agreement and 50 U.S.C. § 459(b) and (c) (Universal Military Training and Service Act). They appeal from a summary judgment in favor of their employer.

Locaynia was hired on November 4, 1964, worked for the airline until he entered military service on May 22, 1965, and was reemployed on his return from the service on June 5, 1967. Golden was employed on March 29, 1965, entered the service on October 22, 1965, and was reemployed on October 16, 1967, after his separation. Specht was employed on April 27, 1964, entered the service on May 22, 1965, and was reemployed on June 12, 1967, when he had completed service.

Each appellant received his vacation benefits for the years 1964 and 1965. American refused to grant any of appellants' vacation benefits in 1967, the year of their reemployment. In 1968, Locaynia was given seven days paid vacation, and Golden received three days.

Appellants contend that each was entitled to ten days paid vacation in 1967 and 1968 in accordance with the terms of 50 U.S.C. § 459(b) and (c)[1] and articles 8(a)[2] and 18[3] of the collective bargaining

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[1]In pertinent part, § 459 provides:

"(a) Any person inducted into the armed forces under this title . . .

"(b) . . . who, in order to perform such training and service, has left or leaves a position (other than a temporary position) . . .

". . .

"(B) if such position was in the employ of a private employer, such person shall—

"(i) if still qualified to perform the duties of such position, be restored by such employer . . . to such position or to a position of like seniority, status, and pay;

". . .

"(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with [the foregoing provisions] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

[2]Article 8, in pertinent part, provides:

"(a) Employees hereunder shall become entitled to and receive vacation allowance in accordance with the following:

"(1) As used herein the term 'year' is used to mean a calendar year.

"(2) As of December 31 of each year, each employee hereunder who has had one (1) year or more of *continuous service* with the Company will be entitled to a vacation period of two (2) weeks (ten regular workdays) to be taken in the following year.

"(3) As of December 31 of each year, each employee hereunder who has had five (5) years or more of continuous service with the Company will be entitled to a vacation period of three (3) weeks (fifteen regular workdays) to be taken in the following year." [Emphasis added.]

". . .

"(d) Vacation allowances shall not be cumulative and a vacation to which an employee becomes entitled on December 31 of any year shall be forfeited unless taken during the following year."

[3]Article 18 says:

"(a) The reemployment and seniority status of any employee hereunder, who, while in the active service of the

agreement. American argues to the contrary, relying primarily on section 459(c) (1)[4] and article 8(e)[5] and article 17[6] of the collective bargaining agreement.

Company entered the armed services or the Merchant Marine of the United States, shall be governed by the provision of the Selective Training and Service Act of 1948, as amended, or other applicable law.

"(b) Time spent on military leave shall count as time worked for purposes of seniority, [status, and] wage rates within the employee's classification and vacation.

"(c) An employee granted a leave of absence to go on a tour of duty with the National Guard or other reserve unit shall accrue length of service for pay purposes for the period of such leave."

[4]50 U.S.C. § 459(c) (1) states:

"(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) . . . shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

[5]Article 8(e) provides:

"(e) An employee hereunder who takes a leave or leaves of absence which exceeds or the total of which exceeds sixty (60) calendar days during any calendar year shall have his vacation allowance to which he becomes entitled on December 31 of that year reduced by one (1) workday for each thirty (30) calendar days of said leave or the total of such leaves exceeds sixty (60) days if he has less than five (5) years of service with the Company, by one and one-half (1½) workdays. . . ."

[6]Article 17 provides:

"(a) When the requirements of the service will permit, an employee hereunder may be granted a leave of absence for a period not in excess of ninety (90) days. When such leaves are granted, the employee shall retain and shall continue to accrue seniority during such leave.

"(b) When the requirements of the service will permit, such leave or leaves may be extended for additional periods of not to exceed ninety (90) days for each such leave when approved by the Company in writing."

The narrow issue presented is this: Was this vacation pay a perquisite of seniority, as appellants claim, or was it within the category of "other benefits," as American contends? Resolution of the issue turns on the appropriate interpretation of Accardi v. Pennsylvania R. R. (1966) 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 and Eagar v. Magma Copper Co. (1967) 389 U.S. 323, 88 S.Ct. 503, 19 L.Ed.2d 557.

In *Accardi* the Supreme Court noted that nowhere in the act is the term "seniority" defined, "but it derives its content from private employment practices and agreements. . . . The term 'seniority' is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of the country." (Accardi v. Pennsylvania R. R., *supra* 383 U.S. at 229-230, 86 S.Ct. at 771. *See also* Hollman v. Pratt & Whitney Aircraft (5th Cir. 1970) 435 F.2d 983, 989; Morton v. Gulf, Mobile & Ohio R. R. (8th Cir. 1969) 405 F.2d 415, 419; Edwards v. Clinchfield R. R. (6th Cir. 1969) 408 F.2d 5.) Referring to the "other benefits" clause, the Court observed that "it is enough to say that we consider that it was intended to add certain protections to the veteran and not to take away those which are granted him by § 8(b) (B) and the other clauses of § 8(c)." (Accardi v. Pennsylvania R. R.,

supra 383 U.S. at 232, 86 S.Ct. at 773; *See also* Hollman v. Pratt & Whitney Aircraft, *supra* 435 F.2d at 986-987; Morton v. Gulf, Mobile & Ohio R. R., *supra* at 405 F.2d 419-420.)

Eagar was a per curiam reversal of this court's decision in Magma Copper Co., San Manuel Division v. Eagar (9th Cir. 1967) 380 F.2d 318 in which we held that vacation pay was not an attribute of seniority, but a fringe benefit, adopting the language of Siaskiewicz v. General Electric Co. (2d Cir. 1948) 166 F.2d 463, 465-466:

> " 'Since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of "other benefits." Hence, under the language of the Act, appell[ees] must be treated like non-veteran employees on furlough or leave of absence. But non-veteran employees of [Magma] who were on leave of absence . . . would not be entitled to vacation to pay for that year. Therefore, appell[ees] are not so entitled. . . .' " (380 F.2d at 321.)

We read the Supreme Court's summary reversal of *Eagar* as an explicit rejection of American's contention.[7] Accordingly, the judgment is reversed with directions to enter judgment in favor of appellants.

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[7]The dissenters' opinion (per Douglas, J.), 389 U.S. 323, 325, 88 S.Ct. 503, 19 L.Ed.2d 557, reinforces our construction of the per curiam opinion. The Fifth, Sixth, and Eighth Circuits have reached similar conclusions: Hollman v. Pratt & Whitney Aircraft, *supra*, 435 F.2d 983; Edwards v. Clinchfield R. R., *supra*, 408 F.2d 5; Morton v. Gulf, Mobile & Ohio R. R., *supra*, 405 F.2d 415. The Tenth Circuit is to the contrary: Kasmeier v. Chicago, Rock Island & Pacific R. R. (1971) 10 Cir., 437 F.2d 151.

Dissenting Opinion.

BATTIN, District Judge:

This case involves the application of 50 U.S.C. App. § 459(b) and (c)[1] to vacation pay. The three appellants were employed by appellee. After continuous employment, all three were inducted into the military service in 1965. Each applied for return to appellee's employment within ninety days of the termination of his active duty status in 1967. All three were reemployed that same year.[2]

Appellants were paid by appellee for vacation time accrued by them under the collective bargaining agree-

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[1]50 U.S.C. App. § 459

"(b) *Reemployment rights*

In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer . . .

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay;

. . .

"(c) *Service considered as furlough or leave of absence*

(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, . . ."

[2]

Name	Hired	Left for Military	Rehired
Locaynia	Nov. 4, 1964	May 22, 1965	June 5, 1967
Golden	March 29, 1965	Oct. 22, 1965	Oct. 16, 1967
Specht	April 27, 1964	May 22, 1965	June 12, 1967

ment in 1964 and 1965, when they left to enter the military. Appellee allowed appellants vacation pay for the work year 1967, in accordance with the collective bargaining agreement, considering appellants' 1967 military service time as a leave of absence, for purposes of determining the number of vacation days to which appellants were entitled.

It was stipulated by the parties that the maximum of vacation days to which appellants were entitled under the bargaining agreement was ten. This is based on their length of service, including military service, with appellee. Thus, appellee concedes that, had the addition of military service time to length of service caused the appellants to be in a category in which the vacation days allowed was greater than if military service time were not computed, they would be entitled to the greater number of vacation days under 50 U.S.C. App. § 459(b). In other words, appellee admits that the maximum entitlement of vacation days rests upon seniority and that in this regard an employee's rights are determined with respect to his military service as though he had never left his employment to serve in the military.

From this point, however, appellee and appellants have different views of the meaning of the Act and the cases interpreting it. Appellee claims that under the collective bargaining agreement and Section 459(c) of the Act, appellants must earn their vacation by fulfilling a "work requirement" as set forth in the collective bargaining agreement.[3] Appellants, on the other hand,

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[3]"Article 8(a). Employees hereunder shall become entitled to and receive vacation allowances in accordance with the following:
(2) As of December 31 of each year, each employee hereunder who has had one (1) year or more of continuous

(This footnote is continued on next page)

argue that Section 459(b) and (c) of the Act require that they be given full vacation time, even though they did not work one day that year.

It appears to me that the issue is whether the various requirements, which must be met to entitle an employee to vacation pay, are defined totally as attributes of seniority, or whether they are in part defined as seniority and in part defined as "other benefits" under Section 459(c). If the former is true, then the bargaining contract cannot affect the number of vacation days allowed, since Section 459(c) clearly states that an employee, rehired under Section 459(b), cannot lose any seniority rights due to his absence for military service. If, on the other hand, vacation pay entitlement, with regard to the requirement that it be earned, is something other than an attribute of seniority, then the "other benefits" clause of Section 459

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service with the Company will be entitled to a vacation period of two (2) weeks (ten regular workdays) to be taken in the following year.

(e) An employee hereunder who takes a leave or leaves of absence which exceeds or the total of which exceeds sixty (60) calendar days during any calendar year shall have his vacation allowance to which he becomes entitled on December 31 of that year reduced by one (1) workday for each thirty (30) calendar days of said leave or the total of such leaves exceeds sixty (60) days if he has less than five (5) years of service with the company . . . provided, however, no deduction from vacation allowance shall be made for leaves of absence granted due to injury sustained while on duty."

"Article 18—Military Leave

(a) The reemployment and seniority status of any employee hereunder, who, while in the active service of the Company entered the armed services or the Merchant Marine of the United States, shall be governed by the provisions of the Selective Training and Service Act of 1948, as amended, or other applicable law.

(b) Time spent on military leave shall count as time worked for purposes of seniority, wage rates within the employees' classification and vacation."

(c), which requires that the conditions of the collective bargaining agreement be met, must apply.

Two United States Supreme Court decisions appear to be the key to the interpretation of Section 459 as it applies to vacation pay: Accardi v. Pennsylvania R. Co., 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966), and Eagar v. Magma Copper Co., 389 U.S. 323, 88 S.Ct. 503, 19 L.Ed.2d 557 (1967).

In *Accardi*, the Supreme Court stated that

> "the term 'seniority' is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act [see 50 U.S.C. App. § 459(c) (2)]. That intention was to preserve for the returning veterans the rights and benefits which would have *automatically* accrued to them had they remained in private employment rather than responding to the call of their country." (Emphasis supplied.) 383 U.S. at 229-230, 86 S.Ct. at 771.

An examination of the facts in *Accardi* reveals that the appellants had been employed by the railroad in 1941 and 1942. They left this employment for varying periods to serve in the military during World War II and returned to the railroad's employment after completion of their military tours. In 1960, as part of the settlement of a labor dispute, the position of Fireman, which the appellants held, was abolished. Under the bargaining agreement, the railroad was to retain all firemen with twenty or more years seniority, but was able to discharge all firemen with less than twenty years seniority upon payment of severance pay.

Severance pay, under the bargaining agreement, was to be based on the length of "compensated service" with the railroad. However, compensated service of one month was defined as any month in which an employee worked one or more days. Compensated service of one year was defined as compensated service of twelve months "or a major portion thereof."

In determining their severance pay, the railroad did not allow the appellants credit for their military service on the theory that they had had no compensated service during that period. The appellants argued that this was contrary to Section 8 of the Selective Training and Service Act of 1940.

The Supreme Court rejected the argument of the railroad that the severance pay was not based on seniority and that therefore Sections 8(b) (B) and (c) were inapplicable to the case. The Court pointed out that employers and unions cannot use "transparent labels and definitions to deprive a veteran of substantial rights guaranteed by the Act." 383 U.S. at 229, 86 S.Ct. at 771. Hence, seniority must be given a broad interpretation.

In applying its broad interpretation of seniority to the facts in *Accardi,* the Court found that severance pay, contrary to the railroad's argument, was based on seniority and not on the actual total service rendered by the employee. The Court explained its reasoning as follows:

> "As the Government points out, it is possible under the agreement for an employee to receive credit for a whole year of 'compensated service' by working a mere seven days. There would be no distinction whatever between the man who worked one day a month for seven months and the man

> who worked 365 days in a year. The use of the *label* 'compensated service' cannot obscure the fact that the real nature of these payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with the most seniority should receive the highest allowances since they were giving up more rights and benefits than those with less seniority." (Emphasis supplied.) 383 U.S. at 230, 86 S.Ct. at 772.

On the basis of this language, it is clear that the Supreme Court has not ruled out the possibility that compensated service can be a valid requirement for an employee benefit, if it is not a mere label or subterfuge by which those veteran's rights which are in reality attributes of seniority are disregarded and denied. However, a careful examination of the particular right at issue must be made to determine whether it falls in the category of seniority or "other rights."

What then is the status of vacation pay? In January, 1966, this Court held that vacation pay was not covered by the seniority provisions of Section 459. A subsequent petition for rehearing, made on the basis that *Accardi* required a different result, was denied. Magma Copper Company, San Manuel Division v. Eagar, 380 F.2d 318 (9th Cir. 1967).

Under Magma's bargaining agreement, employees were entitled to vacation or vacation pay if:

1. They had been continuously employed by Magma for one year preceding the date of vacation application;
2. They had not had a vacation within that year;
3. They had worked at least 75% of the shifts available to them within that year; and
4. They were employed by Magma on the day the vacation began.

Moreover, the agreement provided that if an employee left Magma's employ for any reason, except layoff, before the annual determinative date, he was not entitled to a vacation. With regard to holiday pay, employees were not eligible unless they had been on Magma's payroll continuously for three months prior to the holiday.

Eagar was employed by Magma from March 12, 1958, to March 6, 1959, at which time he entered the military. When he left, he had worked more than 75% of his available shifts during the year March 12, 1958, to March 12, 1959. He returned to Magma on May 2, 1962, and worked the last shift before and the first shift after Memorial Day and Independence Day. He claimed vacation pay for the year beginning March 12, 1958, and holiday pay for the two holidays in 1962, discussed above.

Magma refused to pay vacation pay because Eagar was not employed at the end of the vacation-determining year as required. Holiday pay was refused because he was not employed for the period required, prior to the holiday. 380 F.2d at 320.

This court recognized in its initial opinion that a returning veteran

> " 'steps back on [the "seniority escalator"] at the precise point he would have occupied had he kept his position continuously during the war.' Fishgold v. Sullivan Drydock & Repair, 328 U.S. 275, 284-285, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230 (1946)." 380 F.2d at 320.

The Court, however, based on case authority before *Accardi*, defined seniority as "rights which automatically accrue as a direct incident of length of job tenure," and defined "other benefits" as " 'miscellaneous fringe benefits not usually regarded as part of "pay," "status," or "seniority." ' [Borges v. Art Steel Co., 246 F.2d 735 (2d Cir. 1957)]." 380 F.2d at 320-321.

The Court then adopted the language of Siaskiewicz v. General Electric Co., 166 F.2d 463, 466 (2nd Cir. 1948), which ruled that

> " 'Since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of "other benefits." Hence, under the language of the Act, appell[ees] must be treated like non-veteran employees on furlough or leave of absence. But non-veteran employees of [Magma] who were on leave of absence * * * would not be entitled to vacation pay for that year. Therefore, appell[ees] are not so entitled. To grant them such pay would be to discriminate in favor of them as veterans and against non-veteran employees.' " 380 F.2d at 321.

Finally, the Court held that the same rationale applied to the claim for holiday pay.

In denying the petition for rehearing, this court reaffirmed its position that vacation pay was not a seniority right and was therefore not affected by the Supreme Court decision in *Accardi*. Judge Madden, however, dissented. He believed that the denial of vacation pay and holiday pay was based on circumstances which brought the case directly under the rule of *Accardi*. It was his opinion that the distinction between seniority rights and other benefits was not the question, but rather the issue was whether the rights claimed " 'would have automatically accrued to them had they remained in their civilian jobs' instead of entering the military service." 380 F.2d at 322.

In a *per curiam* decision, the Supreme Court reversed this court on the basis of *Accardi*. Eagar v. Magma Copper Co., *supra*. Justice Douglas wrote a dissent with which Justice Harlan and Justice Stewart concurred.

Although the majority of the Court did not explain just how *Accardi* required reversal, some insight can be garnered from the dissenting opinion. Mr. Justice Douglas recognized that Eagar had complied with the requirement that he must have worked 75% of the available shifts during the vacation-earning year to be eligible for a vacation. However, he was of the opinion that *Accardi* did not apply because the case involved "other benefits" rather than seniority.

On the surface then, it would appear that the majority of the Court has adopted the view that *all* aspects of vacation eligibility fall within the broad definition of seniority. However, in my opinion, this ignores the fact that Eagar had completed the substantive "work requirements" to qualify him for vacation pay. In other words, he had "earned" his vacation.

In effect, by denying him this benefit on the basis that he was not employed on the first day of the vacation-earning year, the Circuit Court allowed Magma to deny benefits guaranteed Eagar by the Act, "by the use of transparent labels and definitions." *Accardi, supra,* 383 U.S. at 229, 86 S.Ct. at 771.

Employment on the last day of the vacation-earning year has nothing to do with compensation for services rendered and clearly does not require treatment as an attribute of "other benefits." Once the vacation was substantively earned, it would "have automatically accrued to [Eagar] had [he] remained in private employment rather than responding to the call of [his] country." *Accardi, supra,* 383 U.S. at 229-230, 86 S.Ct. at 771.

Such a finding does not require that all attributes of vacation fall within "seniority, status, and pay." Nor does it foreclose the use of a valid work requirement before vacation time accrues.

The fact that seniority is to be given a broad definition was not meant to make it all-inclusive. This is demonstrated by the examination which the *Accardi* Court made of the "compensated service" provision in question. Had the Court intended that all compensated service requirements fall within the definition of seniority, this examination would have been unnecessary.

Instead, the Court required that, if a "compensated service" type requirement was only a facade being used to disguise a seniority benefit, it be interpreted as what in fact it was. This does not preclude the honest use of a "compensated service" type requirement in determining the accrued vacation pay of non-veterans and returning veterans.

If the requirement of American here were only that the employee be on the payroll one day per month for seven months to be entitled to vacation, the "work requirement" could be said to be merely a disguised seniority requirement under the broad *Accardi* definition of seniority. However, such is not the case. All American employees are entitled to a specified vacation time. In addition, they can take sixty days of leave during the earning year without jeopardizing this vacation time. If, however, more than sixty days leave of absence is taken, the employee forfeits a specified amount of vacation pay for each thirty-day leave increment in excess of the sixty days allowed.

This is not a hidden seniority right. Rather, it is a requirement that the employee earn his vacation. He is being given additional compensation for services actually rendered. If he does not render the required services, his pay is reduced accordingly. To find this requirement to be one of seniority would be to open the door to a finding that the fact of payment for work is within the definition of "seniority, status, and pay" and that the employee's salary or wage must be continued during the time he is in military service. Clearly, such a result was not intended by Congress.

It might be argued that the reversal of the *Eagar* case with regard to the holiday pay requires that the appellants' position be successful here. I do not agree.

Magma required by the bargaining agreement that to be eligible for holiday pay, among other things,

> "An employee must have been on the Company's payroll continuously for three (3) months prior to the holiday in question." *Magma, supra*, 380 F.2d at 320.

Regrettably, none of the opinions disclose how this requirement was interpreted. However, a reasonable interpretation of the requirement is that the employee merely appear on the payroll records once each pay period. If the employees were paid weekly, then twelve days work would satisfy this requirement with no distinction drawn between those working one day per week and those working every work day during the three-month period. Such a result clearly brings the facts within the interpretation of seniority by the *Accardi* Court.

The requirement may merely have meant that the employee had to have been employed at least three months before the holiday and not have quit between his first starting date and the holiday. Clearly in this case, the requirement would be one of seniority and not compensated service.

In addition, it can be argued that holiday pay requirements are merely a question of seniority. It is not *earned* by the employee but is *given* to him provided he meets certain requirements, such as length of service. The two requirements in Magma's bargaining agreement support this view. To be eligible for vacation pay, the employee was required to have worked 75% of available shifts, a substantive work requirement, and to be employed on the last day of the vacation-earning year, a seniority requirement. To be eligible for holiday pay, he merely had to be on the payroll continuously for the three months prior to the holiday and apparently to have worked the last shift before and the first shift after. No requirement is made that he have worked a specified number of shifts to be eligible for holiday pay.

Since Magma did not see fit, or was unable, to include such a work requirement in the holiday pay criteria, one is left with the conclusion that the three-month requirement was merely a seniority requirement and not a substantive work requirement.

For these reasons, therefore, I believe that the work requirement imposed by the bargaining agreement in the present case is just that—a substantive work requirement which must be met before vacation is due. Therefore, it does not fall within the seniority definition, as broadened in *Accardi*, but rather is within the classification of "other benefits" and must be ruled by that clause of 50 U.S.C. App. § 459(c).

This interpretation of *Accardi* and *Magma* is not without support. On facts similar to those before us, the Tenth Circuit reached a decision similar to that reached by the court below in this case. There the work requirement was held to fall within the definition of "other benefits" and to thus be ruled by the bargaining agreement under § 459(c) (1). Kasmeier v. Chicago, Rock Island and Pacific Railroad Co., 437 F.2d 151 (10th Cir. 1971).

In Morton v. Gulf, Mobile & Ohio Railroad Company, 405 F.2d 415 (8th Cir. 1969), the court ruled that military service years had to be considered as employment years in determining the maximum vacation pay to which an employee was entitled. Clearly, this is a consideration of seniority and is covered by *Accardi* and *Fishgold*. The decision does not bear on the instant case, however, since it does not deal with a substantive work requirement which requires that an employee meet specified conditions precedent before he is eligible to receive any vacation at all.

Likewise in Edwards v. Clinchfield Railroad Company, 408 F.2d 5 (6th Cir. 1969), time spent in the service was held to be included as employment time in determining the length of vacation pay under the theory of *Accardi* and *Morton*.

In Hollman v. Pratt & Whitney Aircraft, 435 F.2d 983 (5th Cir. 1970), the circuit court affirmed a district court decision which awarded vacation pay to employees for the year in which they entered the service but denied them vacation pay for the years in which they were in the service.

In that case, Hollman left Pratt & Whitney's employ on December 4, 1964, to enter the service. He was denied vacation pay for the earning year 1964 because he had not fulfilled the bargaining contract terms which required that he be in the employ of Pratt & Whitney on December 31, 1964, or have returned to their employ before December 31, 1965. He, of course, could not comply with this requirement because he was in the service. Clearly, the case falls within the *Magma* case. The requirement in question was one of seniority and was not a substantive work requirement. Hollman had earned his vacation and being employed on December 31, 1964, or reemployed before December 31, 1965, had nothing to do with whether the vacation was earned.

It is of note that the district court allowed Hollman payment based on his gross earnings through December 4, 1964, and did not require that his wage be projected through December 31, 1964, for purposes of determining his vacation pay allowance. To be consistent with the contention of the instant appellants, that should have been done. If all the elements of vacation pay

are to fall within the classification of seniority rights, clearly Hollman was entitled to vacation pay based on the assumption that he worked full time during the period in which he was in the military service.

The District Court as noted did not allow this. He was not given vacation pay for the period after December 4, 1964, when he left Pratt & Whitney's employ, for the whole of 1965, during which he was in the military service, nor for January 1, 1966, to November 28, 1966, during which he was in the military service.

It must be recognized, however, that in *Hollman* the only question before the circuit court was whether the trial court erred in allowing Hollman the vacation pay for the earning year 1964. Since Hollman apparently did not appeal the district court's decision, the questions regarding denial of vacation pay for the time actually spent in military service were not in issue.

These three decisions do not require the acceptance of appellants' argument in the instant case. Similarly, they do not prevent us from drawing a distinction between the various elements of vacation pay. Therefore, I would hold that in this case the work requirement with regard to vacation pay is substantive and falls under the classification of "other benefits" in 50 U.S.C. App. § 459(c) and that the appellants are bound by the terms of the bargaining contract in this regard.

APPENDIX B.

The Pertinent Provisions of the Collective Bargaining Agreement Between AMERICAN and Transport Workers Union AFL-CIO Are the Following:

ARTICLE 3—HOURS OF WORK

* * * *

(b) The workweek (and payweek) shall consist of seven (7) consecutive days . . . and the regular weekly work schedule shall consist of five (5) workdays of eight (8) hours each within the workweek.

(c) Each employee shall be scheduled two (2) days off during each workweek. . . .

ARTICLE 8—VACATIONS

(a) Employees hereunder shall become entitled to and receive vacation allowances in accordance with the following:

(1) As used herein the term "year" is used to mean a calendar year.

(2) As of December 31 of each year, each employee hereunder who has had one (1) year or more of continuous service with the Company will be entitled to a vacation period of two (2) weeks (ten regular workdays) to be taken in the following year.

(3) As of December 31 of each year, each employee hereunder who has had five (5) years or more of continuous service with the Company will be entitled to a vacation period of three (3) weeks (fifteen regular workdays) to be taken in the following year.

(4) As of December 31 of each year, each employee hereunder who has had fifteen (15)

years or more of continuous service with the Company will be entitled to a vacation period of four (4) weeks (twenty regular workdays) to be taken in the following year.

* * * *

(d) Vacation allowances shall not be cumulative and a vacation to which an employee becomes entitled on December 31 of any year shall be forfeited unless taken during the following year; . . .

(e) An employee hereunder who takes a leave or leaves of absence which exceeds or the total of which exceeds sixty (60) calendar days during any calendar year shall have his vacation allowance to which he becomes entitled on December 31 of that year reduced by one (1) workday for each thirty (30) calendar days of said leave or the total of such leaves exceeds sixty (60) days if he has less than five (5) years of service with the Company, by one and one-half (1½) workdays if he has five (5) or more years of service with the Company, by two (2) workdays if he has fifteen (15) or more years of service with the Company; provided, however, no deduction from vacation allowance shall be made for leaves of absence granted due to injury sustained while on duty.

(f) In the event of termination of employment with the Company, an employee hereunder who has completed six (6) months of service with the Company shall be paid for a vacation not previously taken to which he became entitled as of the preceding December 31. All vacation accrued since December 31 of the preceding year shall be paid on the basis of five-sixths (5/6) of a day for each full month of service; . . .

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ARTICLE 17—LEAVES OF ABSENCE

(a) When the requirements of the service will permit, an employee hereunder may be granted a leave of absence for a period not in excess of ninety (90) days. When such leaves are granted, the employee shall retain and shall continue to accrue seniority during such leave.

(b) When the requirements of the service will permit, such leave or leaves may be extended for additional periods of not to exceed ninety (90) days for each such leave when approved by the Company in writing.

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ARTICLE 18—MILITARY LEAVE

(a) The reemployment and seniority status of any employee hereunder, who, while in the active service of the Company entered the armed services or the Merchant Marine of the United States, shall be governed by the provisions of the Selective Training and Service Act of 1948, as amended, or other applicable law.

(b) Time spent on military leave shall count as time worked for purposes of seniority, wage rates within the employee's classification and vacation.

(c) An employee granted a leave of absence to go on a tour of duty with the National Guard or other reserve unit shall accrue length of service for pay purposes for the period of such leave.

ARTICLE 24—ABSENCE FROM DUTY

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(b) An employee hereunder shall not be absent from duty without prior permission, in writing, except for reason of sickness, injury or other cause beyond the control of the employee. [Agreed Facts, Exhibit "A".]